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In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES PARHAM, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

J. L. AND J. R., MINORS, ETC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, where the parents of a minor voluntarily place the minor in a state institution, there is sufficient "state action," including subsequent action by the state institution, to implicate the Due Process Clause of the Fourteenth Amendment.[1]

2. Whether the Due Process Clause of the Fourteenth Amendment permits statutory procedures authorizing the commitment to a state mental hospital

[1] This question was added by this Court when it noted probable jurisdiction on May 31, 1977 (App. 949).

of a minor on an application by the minor's parent or guardian approved by a designated state physician.

3. Whether the district court's order requiring the State to release certain class members who concededly could better be cared for in a non-hospital environment if it were available, and to provide facilities necessary to effectuate that release, was a proper exercise of the court's authority.

INTEREST OF THE UNITED STATES

The United States has a substantial interest in safeguarding the constitutional rights of those of its citizens least able to secure these rights on their own—the young and the mentally handicapped. This interest has led the United States to participate, both as *amicus curiae* and as a party, in many cases in which it sought to protect the rights of children and the mentally ill.[2] Last Term, the United States filed a

[2] See *O'Connor* v. *Donaldson*, 422 U.S. 563 (letter submitted to the Court); *Morales* v. *Turman*, 536 F. 2d 864 (C.A. 5) (*amicus curiae*), reversed and remanded, 430 U.S. 322; *New York State Association for Retarded Children, Inc.* v. *Carey*, 393 F. Supp. 715 (E.D. N.Y.) (full participation in all aspects of the case, including discovery and argument; hereafter "litigating *amicus curiae*"); *Davis* v. *Watkins*, 384 F. Supp. 1196 (N.D. Ohio) (litigating *amicus curiae*); *Horacek* v. *Exon*, 357 F. Supp. 71 (D. Neb.) (plaintiff-intervenor); *North Carolina Association of Retarded Children* v. *North Carolina*, 420 F. Supp. 451 (three judge court) (M.D. N.C.) (plaintiff-intervenor); *Halderman and United States* v. *Penhurst*, No. 74–1345 (E.D. Pa.) (plaintiff-intervenor); *United States* v. *Mattson*, decided September 27, 1976, 74–138 (D. Mont.), notice of appeal filed October 19, 1976; *Alexander and United States* v. *Hall*, 64 F.R.D. 152 (D. S.C.) (plaintiff-intervenor); *United States* v. *Solomon*, 419 S. Supp. 358 (D. Md.), affirmed, C.A. 4, No. 76–2814, decided October 12, 1977;

brief in *Kremens* v. *Bartley*, 431 U.S. 119, addressing some of the issues before the Court in the present case.[3]

Large sums of federal money are expended annually in the area of mental health care under, *inter alia*, the Community Mental Health Centers Act, 77 Stat. 290, as amended, 42 U.S.C. 2681 *et seq.*; and the Social Security Act, as added, Sections 1801 *et seq.* and 1901 *et seq.* (medicaid), (Medicare), 79 Stat. 291, 343, as amended, 42 U.S.C. 1395 *et seq.* and 1396 *et seq.* These expenditures reflect the interest of the United States in the improvement of mental health facilities; it has a correlative interest in ensuring that people who do not require confinement are not committed to facilities from which people requiring inpatient treatment may, therefore, be turned away. See S. Rep. No. 294, 90th Cong., 1st Sess. 3 (1967).

Gary W. and United States v. *Stewart*, No. 74–2412–C (E.D. La.) (plaintiff-intervenor); *Stockton and United States* v. *Alabama Industrial School*, No. 2834–N (M.D. Ala.) (plaintiff-intervenor); *Rone and United States* v. *Fireman*, No. 75–355A (N.D. Ohio) (plaintiff-intervenor); *Jenkins* v. *Cowley*, No. 3–74–394–C (N.D. Tex.) (litigating *amicus curiae*); *Stamus and United States* v. *Leonhardt and State of Iowa*, 414 F. Supp. 439 (S.D. Iowa) (plaintiff-intervenor); *Ewing* v. *Gaver*, No. C–74–147 (N.D. Ohio) (litigating *amicus curiae*); *Evans* v. *Washington*, No. 76–0293 (D. D.C.) (*amicus curiae*).

[3] In *Kremens*, this Court declined to reach the merits of the questions presented, and remanded for reconsideration of the class definition in light of intervening legislation and regulations (431 U.S. at 132–133).

STATEMENT

1. PROCEDURAL HISTORY

This action was brought on October 24, 1975, by two minors, J. L. and J. R., on behalf of a class of all persons younger than 18 who are now or hereafter received for diagnosis in or committed to State mental health facilities pursuant to Ga. Code Ann. 88–503.1 (a) (App. 1). That section states that:

> [T]he superintendent of any facility may receive for observation and diagnosis * * * any individual under 18 years of age for whom such application is made by his parent or guardian. * * * If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.[4]

Named as defendants were appellants herein—the Commissioner of the State Department of Human Resources, the Director of the Division of Mental Health, and the Chief Medical Officer of Central State Hospital (App. 3–4).

Appellees alleged that the operation of Section 88–503.1(a), the "voluntary" commitment statute, deprives them of liberty without due process, and therefore violates the Fourteenth Amendment (App. 11). Plaintiffs also alleged that continued confinement without consideration of placement in the "least drastic environment" was an additional violation of plaintiffs' due process rights (*ibid.*). The named plaintiffs each alleged that he had been committed to a Georgia state mental institution following application filed by his parent or guardian and that he did not then, and does not now, wish to remain in the institution (App. 5–9.)[5] Plaintiffs alleged that they were committed without a hearing or other procedural safeguards and that neither when they were committed, nor periodically during their confinement, have they been considered for placement in the "least drastic environment" (App. 7, 9). Plaintiffs alleged that continued confinement will result in harm to each (App. 6–9), and sought declaratory and injunctive relief as well as monetary damages (App. 12–14).

On November 18, 1975, the district court certified the action as one or behalf of a class of "all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment" pursuant to Ga. Code Ann. 88–503.1(a) (App. 49).[6]

[4] The phrase "as may be authorized by law" is not specifically defined or further explained in the state code. However, the code does contain a section delineating the rights of patients during confinement. Ga. Code Ann. 88–502 *et seq.* (1971 rev.). Section 88–503.1(a) also permits the superintendent to recive any person over 18 on the person's own application, and any person legally adjudged to be incompetent on the application of a guardian.

[5] Appellee J L. was committed by his mother and stepfather (App. 5); appellee J. R. was committed by the Stephens County Department of Family and Children Services (apparently a division of the Georgia Department of Family and Child Service), his legal guardian (App. 7).

[6] In August 1976, appellee J. L. died, and this Court was promptly notified of his death. See Brief of Appellee 5. His death does not moot the case for class members admitted, as was J. L.,

A three-judge court was convened and, after receiving stipulated evidence and deposition testimony,[7] issued its opinion and order on February 26, 1976 (J.S. App. 1a–57a). The court held that the commitment of a child pursuant to Ga. Code Ann. 88–503.1(a) was a denial of liberty without due process (J.S. App. 53a); it declared the statute unconstitutional and enjoined further confinement of any child under 18 who had been admitted at the request of his parent or guardian pursuant to that statute (J.S. App. 56a). The court ordered the defendants within sixty days to initiate commitment proceedings for, or arrange to release, class members presently confined (J.S. App. 55a). The court also held that the State must provide less restrictive treatment facilities for 46 class members who, the defendants admitted,[8] could appropriately be treated in such facilities (J.S. App. 54a–55a). No damages were awarded.

Judgment was entered on March 11, 1976. Appellents' motion for a stay, filed on March 10, 1976, was denied by the three-judge court on March 17, 1976 (App. 937–946); this Court granted the stay on April 5, 1976 (425 U.S. 909). On May 31, 1977, probable jurisdiction was noted (App. 949).

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on the application of a parent. For those class members still institutionalized the case presents a live controversy. See *Sosna* v. *Iowa*, 419 U.S. 393, 399, 402. Cf. *Kremens* v. *Bartley*, *supra*, 431 U.S. at 130–133.

[7] The three-judge court also visited two of the state mental hospitals in which members of the plaintiff class are confined (J.S. App. 10a–11a).

[8] See p. 12, *infra*.

2. FACTS

Under the Georgia Code, minors under the age of eighteen may be committed to a State mental hospital upon the application of the minor's parent or guardian[9] if the responsible physician at the mental hospital determines that the child is in need of treatment. Ga. Code Ann. 88–503.1,(a).[10] At any one time, there are between 140 and 200 children in Georgia mental hospitals who were admitted pursuant to Section 88–503.1(a) (J.S. App. 13a–14a).

The precise manner in which a minor is admitted differs among the State's eight mental health facilities; however, in every instance the decision whether or not to accept the child for treatment is made by a physician employed by the State (App. 224; deposition of Dr. Douglas Skelton, Director of State Division of Mental Health).

That decision is based on interviews and recommendations by hospital or community health center staff.[11] The staff interviews the child and the parent

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[9] When a child has been removed from the custody of his parents, the Georgia Department of Family and Children Services (DFCS) may be given custody of the child. DFCS may then, as legal guardian, seek hospitalization for the child, as it did in the case of J.R. (App. 71).

[10] Under Section 88–503.1(b) of the Code, a minor 14 years old or older may make his own application for commitment.

[11] The superintendents of most of the regional mental hospitals testified that they preferred that the child first be brought by the parent or guardian to a local community health center (the community health centers provide outpatient care while the child remains in the home). When the child is presented to the community health center, he is interviewed by a member or members

or guardian who brings the child to the facility (App. 251–252, 284, 492). Although attempts are made to communicate with other possible sources of information about the child, such as a family physician or school personnel (App. 250, 284, 299, 467, 470), the primary source of information about the child is the parent or guardian (App. 299, 370, 569, 801). The staff recommends that a child should be hospitalized only after concluding that the child cannot be appropriately served by outpatient treatment provided by the health center while the child remains with his parents, or by placement in an available foster home.

When the child is first brought to a community health center, the interviews and accumulation of secondary information are usually done in one or two days, and a recommendation is reached within a day or two thereafter. If the recommendation is that the child be hospitalized, the child may be sent to the regional hospital for admission or a screening appointment (see note 11 *supra*). The decision on admission is usually made the same day a child is brought to the regional hospital, whether or not the hospital

of the staff, and a recommendation is made for outpatient treatment or hospitalization. Some regional hospitals admit *all* children for whom hospitalization is recommended by the community clinic (depositions of Dr. Donald Miles, Superintendent of Georgia Mental Health Institute, App. 271, and Dr. Eugene Jarrett, Superintendent of Southwestern State Hospital, App. 443), while some hospitals do a separate screening at the hospital even if hospitalization is recommended by the community clinic (depositions of Lawson Bowling, Superintendent of Georgia Regional Hospital at Atlanta, App. 357, and of Wladyslaw Mazur, Superintendent of West Central Georgia Regional Hospital, App. 479).

reinterviews children whose hospitalization is recommended by the clinic (App. 369). At no time prior to commitment of the child is the decision of the state physician subject to review by any independent authority.[12]

In most of the State's regional hospitals, when the child is admitted the staff attempts to devise a plan of treatment ultimately leading to return of the child to the parents (App. 360, 443, 481). Thereafter, there is no consistent state-wide policy regarding periodic review of the child's condition and necessity for continued confinement in the hospital. Nearly all the regional facilities perform a weekly staff review of each patient to determine the effectiveness of the treatment he is receiving and consider whether it should be modified. This review usually does not consider alternative placement for the child (App. 359, 450). The frequency of a more complete review of the child's progress differs from hospital to hospital.[13]

[12] Nor is there any specific provision for post-commitment review of his decision. Appellants assert that the validity of confinement may be judicially tested by the patient or his representative through a petition pursuant to Ga. Code. Ann. 88-502.11 alleging that the commitment procedures are being abused or questioning "the cause and legality of detention" (Brief 36–37).

[13] At Central State Hospital, for example, there is no regularly scheduled review, beyond regular staff meetings, of each child's condition (App. 312). At Southwestern State Hospital, there is a review by hospital staff and community staff at least monthly (App. 449–456), and a similar review of each case at the Georgia Regional Hospital at Augusta occurs at least every 100 days (App. 562, 563).

Release of the child following treatment depends upon the willingness of the parent or guardian to have the child returned. According to deposition testimony, some parents are unwilling to resume care of their child; the frequency of such reluctance was variously described as being "rare" (App. 561) and as occurring in as many as twenty-five percent of the cases (App. 365, 570). In the case of a child like J. R., who is already in the the legal custody of DFCS, release following treatment depends on the agency's ability to secure a foster home for the child. DFCS may also seek to secure foster care for a child whose parents are unwilling to accept him (App. 26). If no appropriate foster care is located, the child remains hospitalized.[14]

The "voluntary" admission statute permits anyone who has voluntarily admitted himself to a mental facility to secure his release by application. Ga. Code Ann. 88.503.3(a). Unless the superintendent moves to secure the patient's involuntary commitment (through

[14] The recommended treatment for J. L., and a number of others in the class, was "specialized foster care" (J.S. App. 21a, n. 18, see pp. 12–13, *infra*). Specialized foster care requires placement with "foster families selected to provide specialized foster care to disturbed children; such parents would be assisted through ongoing instruction from mental health workers in therapeutic management of their disturbed foster children" (App. 911). At the time of the district court decision, there were 13 such foster homes in the entire State, each of which could take no more than two children. Although 7 additional homes had been included in the DFCS budget for several years, no volunteer parents had been found. The court stated that the evidence indicated DFCS had not made substantial efforts to find them (J.S. App. 15a).

court procedures), the patient must be released. In the case of a minor, release on application is "conditioned upon consent * * * of his parent or guardian." Ga. Code Ann. 88–503.3(a). The statute also provides that the hospital "shall discharge any voluntary patient who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable." Ga. Code Ann. 88.503.2.

Independent experts and employees of the State hospitals testified that long-term hospitalization is likely to have a detrimental effect on the development of a child (App. 30–34, 177–766, 804). This detrimental effect may include the development of behavior designed to succeed in the institutionalized setting ("colonization"), making the person less likely to be able to adapt to a non-institutional environment (App. 22–23), or the development of hostile and aggressive behavior that may lead to more psychological problems (App. 33, 178, 183).[15] Testimony also indicated that long hospitalization may

[15] One expert testified concerning the effects of continued hospitalization on J. L. and J. R. The expert stated that, for J. R., continued hospitalization "is not the optimal [setting] and in many respects could be detrimental" (App. 30). He described J. R. as "an excellent type of candidate for colonization" (*ibid.*). J. L., he testified, would also suffer from continued hospitalization, possibly developing more psychological problems due to hostile reaction to his situation (App. 33). Both J. L. and J. R., he testified, could benefit from alternative treatments, but such alternatives were not available, resulting in continued hospitalization (App. 30–34).

cause psychological damage to an individual's sense of self-worth, and may lead to a stigma, which in many cases will cause difficulty in later life (App. 177, 179, 512).

On January 24, 1976, in response to an inquiry from the court, the defendants submitted a letter showing that as of January 19, 1976, there were 46 hospitalized children in the certified class who, in the opinion of the hospital staff personnel, could "optimally [be] cared for in another, less restrictive, non-hospital setting if it were available" (J.S. App. 21a; see App. 760–761, 772).[16] For each of the 46, the particular optimal alternative care recommended (such as group home, specialized foster care, etc.) was specified (see J.S. App. 21a–22a). A report issued on November 9, 1973, by a commission appointed by the Georgia Division of Mental Health to study and recommend changes in the State's programs of mental health services for children found that a large number of children who were institutionalized[17] could be served in alternative facilities and recommended the establishment of numerous alternatives to hospitaliza-

[16] Both J. L. and J. R. were evidently in this group. See J.S. App. 21a, n. 18; App. 98, 109 (J.L.), 143, 145 (J. R.).

[17] The report appeared to refer to all children hospitalized, not only to those "voluntarily" admitted pursuant to Ga. Code Ann. 88.503.1(a). During 1973, when the report was issued, 639 children were admitted to hospitals, 458 voluntarily and 181 involuntarily (J.S. App. 12a–13a). The report stated that in three of five hospitals studied, "a majority of the children need not be hospitalized if alternative services were available in the community" (App. 915).

tion "which * * * do not exist at present in Georgia" (App. 900, 907–908).

3. DECISION OF THE DISTRICT COURT

The court concluded that the statute establishing the procedures for voluntary admission of children by parents and guardians unconstitutionally denied the children their liberty without due process of law. The court specifically held that the confinement of a child was a situation requiring the protections of due process (J.S. App. 49a) and concluded that "[n]either the statutory scheme nor the practices and policies utilized by the defendants provide for any procedural safeguards" (J.S. App. 46a–47a). The court rejected the State's argument that its statute merely assisted parents in carrying out parental responsibilities, holding that when the State acts, even in *parens patriae,* it must provide due process (J.S. App. 50a–51a). The court stated that requiring the protections of due process in this situation is not an "indictment of psychiatry" (J.S. App. 52a), but merely a recognition of the inexact nature of the science and the necessity for procedural safeguards designed to "guard against errors in judgment and/or arbitrariness that the best of us humans exhibit from time to time" (J.S. App. 52a). The court ordered the defendants to institute involuntary commitment proceedings under other statutes, including the Juvenile Court Act (Ga. Code Ann. 24A *et seq.,*) against each child in their custody, or to arrange for his release, within sixty days (J.S. App. 55a).

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The court found that the State has known since 1973 of the need for non hospital facilities for children who could be treated in such facilities (J.S. App. 52a). The court noted the State's belief that 46 children in the plaintiff class could optimally be cared for in alternative, non-hospital facilities if such facilities were available (J.S. App. 21a, 54a), and held that the State must provide appropriate non-hospital facilities for these children and place them in such facilities as soon as possible (J.S. App. 54a).[18]

Although the complaint prayed for a damage award, the court's remedial order made no provision for damages. Appellees have not asked this Court to review that omission.

SUMMARY OF ARGUMENT

The procedures authorized by the Georgia statute at issue here must conform to the due process clause of the Fourteenth Amendment, because the State is significantly involved both in the commitment of children to state mental institutions and in their treatment and retention once they have been committed. Although the initial request for commitment may be

[18] The court emphasized (J.S. App. 54a) that its order required the defendants to "*spend such money of the State of Georgia as is reasonably necessary to provide such non-hospital facilities and personnel*" (emphasis in original) and see J.S. App. 23a; App. 942. But the court also noted that the cost of accommodating a child in the alternative facilities would be substantially less than retaining him in the mental hospital (J.S. App. 23a; App. 943). Appellants evidently do not dispute this (see Brief for Appellants 52–53).

made by the child's parents, no child can be committed unless a state representative (a doctor at the receiving hospital) decides that the child needs treatment. That decision is sufficient to render the initial commitment State action for purposes of the Fourteenth Amendment. Since decisions concerning the child's treatment and other conditions of confinement are made by State agents, those decisions too are subject to scrutiny under the Fourteenth Amendment.

Commitment to a mental institution involves such substantial interference with the liberty of any person, whether child or adult, that state commitment procedures must provide due process to be consistent with the Fourteenth Amendment. Although persons who voluntarily consent to commitment waive these procedural protections, the potential for conflict between the interests of parent and child is too great to permit the parent to waive the child's personal constitutional right.

To determine the procedures constitutionally necessary to permit commitment of a child to a mental institution, it is necessary to balance the interests involved. All three participants in the process—parent, child, and State—are concerned that those children, and only those, who need institutionalization be confined, and that the procedures by which this is accomplished be as efficient and as non-burdensome as possible. In addition, the child has an independent interest in liberty, and the parent has an independent interest in the unhampered exercise of his responsibility for his child.

The current state procedures do not properly balance these various interests, since they permit the commitment of a child on the basis simply of interviews with the child and his parents, and provide no method by which any person adversely affected by the commitment may challenge it before an independent tribunal, either before or after commitment. In light of the constitutional inadequacy of the Ga. Code Arn. 88–503.1(a), the court correctly directed that available formal statutory procedures be followed in committing children to State mental institutions. The State remains free to promulgate alternative informal commitment procedures that satisfy the Fourteenth Amendment.

Finally, we submit that the question whether the State must provide alternative treatment facilities for certain class members is not ripe for decision by this Court, in view of the ambiguity concerning the legal rationale for this aspect of the court's order, and the paucity of the record supporting that order.

ARGUMENT

I. STATE ACTION IS PRESENT IN THE DECISION OF THE STATE'S PHYSICIAN TO COMMIT A CHILD TO A STATE FACILITY, PURSUANT TO STATUTORY PROCEDURES ESTABLISHED BY THE STATE LEGISLATURE

In order for the Fourteenth Amendment to apply to the commitment of children described in the Statement portion of this brief, the State must be "significantly involved" in the commitment process. *Reitman* v. *Mulkey,* 387 U.S. 369, 378. See also *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 172; *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 349–351. That involvement may be either in initiating the process, or in substantially facilitating its completion once it has been privately initiated. *Shelley* v. *Kraemer,* 334 U.S. 1, 19–20; cf. *Fuentes* v. *Shevin,* 407 U.S. 67.[19]

The first step in the commitment of a child pursuant to Ga. Code Arn. 88–503.1(a) typically is the decision of a parent or guardian to seek commitment, a decision in which the State may not be involved. Of course, for children, like J. R., whose custody has previously been awarded to the State Department of Family and Children Services, the initial decision and all other steps in the process of commitment are taken by agents of the State. See n. 9, *supra;* App. 140. The commitment of such children unquestionably involves state action, and appellant does not suggest otherwise (Brief 21–25).

Even when the initial decision to seek to commit the child is made by his parent or private guardian, the agents of the State are significantly involved in the decision to commit, as well as the commitment itself. No child can be committed to a state hospital

[19] Section One of the Fourteenth Amendment prohibits the State from denying equal protection of the laws as well as from depriving persons of liberty without due process. Although most of the cases discussing the distinction between private and State action involve claims of racial discrimination, the standards expressed in those cases apply to a claim that the State has deprived one of liberty without due process. *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 349–351.

pursuant to Section 88–503.1(a) without the agreement of the appropriate state hospital physician (App. 3664; see also App. 224, 261, 304).[20] If the state physician does not find that the child is in need of treatment, the child, regardless of the parents' wishes, will not be admitted to the State facility (App. 263, 305). 21/ This case therefore does not require the Court to consider whether a State's acqui-

[20] It is significant that actions of State officials are necessary before commitment can occur. In *Fuentes* v. *Shevin*, *supra*, without discussing the state action issue, the Court applied the Fourteenth Amendment to the action of a State court which, on application of a private party, had ordered the goods of another summarily seized. In *Adams* v. *Southern California First National Bank*, 492 F. 2d 324 (C.A. 9), a case in which a creditor seized property of a debtor without judicial intervention, the court of appeals held that there was no state action, noting that in *Fuentes* the state court's order supplied the state action bringing the transaction within the coverage of the Fourteenth Amendment. 492 F. 2d at 338. Cf. *Jackson* v. *Metropolitan Edison Co.*, *supra*, where this Court noted that no state officials had acted in support of the utility's termination of electrical service. See 419 U.S. at 355 and n. 15.

[21] Although, as appellants emphasize (Brief 23–24), the ultimate decision *not* to commit the child remains with the parent, it is the decisions to commit actually made in these cases, not hypothetical decisions to refrain from commitment, that are here alleged to violate the Fourteenth Amendment.

Appellants similarly argue that because the parents may always remove their voluntarily committed child from the state hospital, see Ga. Code Arn. 88–503.3, the State does not assert any right to detain the patient, and so the continued detention for treatment is private action, rather than State action. See Brief of Appellants 27. But the State, by retaining custody of the child in the absence of parental removal, has involved itself in the continued deprivation of the child's liberty; state action is present in the retention of the child as well as in the initial commitment.

escence in a purely private determination to commit a child to a state institution is state action implicating Fourteenth Amendment safeguards.

After commitment, state action continues; treatment is provided by the state hospital, where the child is physically detained. Decisions on treatment and the conditions of confinement during the child's period of hospitalization are all made by agents of the State employed at the state hospital. Such acts of state hospital employees are actions of the State and subject to scrutiny under the Fourteenth Amendment. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 576; *Spence* v. *Staras*, 507 F. 2d 554 (C.A. 7).

These procedures unambiguously and significantly involve State officials in the commitment, detention, and treatment of a voluntarily committed child. Even when the initial decision to seek treatment is privately made, the remaining significant events are all ordered, and enforced, by agents of the State. Such action places the power of the State behind the commitment of the child, and places at least the approval of the State on the decision to commit the child. The deprivation of liberty, ordered and enforced by state officials, who assume custody of the child, is therefore subject to application of the Fourteenth Amendment. Here, as in *Shelley* v. *Kraemer*, *supra*, 334 U.S. at 19, it is the "active intervention of the state" that has resulted in the challenged deprivation of liberty.[22]

[22] Although *Shelley* v. *Kraemer* involved the intervention of a state court, its principles are not limited to state action solely by state courts. See *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 172.

And here, as in that case, the State's active intervention, in bringing about a result that would not occur but for that intervention, is sufficient to transform the privately initiated activity into conduct subject to the Fourteenth Amendment.[23]

[23] The question whether commitment to private hospitals would implicate the Fourteenth Amendment is not presented by this case, since the class includes only children detained in state hospitals J.S. App. 55(a). The record contains no discussion of children who are committed to private hospitals in Georgia.

The coverage of the statute at issue here, Ga. Code Arn. 88–503.1, is not limited to public facilities. The statute applies to a "facility," which is defined in Ga. Code Arn. 88–501(c) to include state and federal hospitals "utilized for the diagnosis, care, treatment, training or hospitalization of persons who are mentally ill * * * and any other hospital within the State of Georgia approved for such purpose by the [Georgia] Department [of the Public Health]". In addition, Section 88.508.6 states that when any private facility is approved by the State as a private emergency, evaluating, or treatment facility, it "should have all powers given to the corresponding type of facility under the provisions of this Chapter on voluntary admission * * *, and shall have all duties and obligations of such facilities imposed by this Chapter."

Both parties suggest that a commitment of a child to a private hospital would be wholly free of Fourteenth Amendment scrutiny. See Brief of Appellants 25; Brief of Appellees 13. But that may not be correct. Both *Peterson* v. *City of Greenville*, 373 U.S. 244, 248, and *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 170, suggest that actions of private entities that serve as one method of enforcing, or implementing, policies adopted by the State, are state actions. And in *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F. 2d 638 (C.A. 4), a private hospital's refusal to perform a nontherapeutic abortion requested by a patient was held to be state action because the hospital based its policy on a state law which, under criminal penalty, permitted only therapeutic abortions. See also *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (applying the Fourteenth Amendment to a State's conferral of veto power on parents over the performance of abortions by private physicians).

This Court's opinions in *Jackson* v. *Metropolitan Edison Co.*, *supra*, and *Moose Lodge No. 107*, *supra*, suggest that the existence

Some cases have suggested that when the action at issue does not involve racial discrimination, a more stringent standard of state involvement should be used to determine whether the action is subject to scrutiny under the Fourteenth Amendment. See *Lucas* v. *Wisconsin Electric Power Company*, 466 F. 2d 638 (C.A. 7), certiorari denied, 409 U.S. 1114; *Adams* v. *Southern California First National Bank*, 492 F. 2d 324, 329 (C.A. 9). In these cases, the courts of appeals held that for private actions of a non-racial nature to implicate the Fourteenth Amendment, there must also be state action that affords

> affirmative support, [which] must be significant, measured either by its contribution to the effectiveness of [the private party's] conduct, or perhaps by its defiance of conflicting national policy.

Lucas, *supra*, 466 F. 2d at 656; *Adams*, *supra*, 492 F. 2d at 335.

of state action may depend on establishment of a "nexus" between the State law or regulation and the private action involved. See *Jackson*, *supra*, 419 U.S. at 351, and *Moose Lodge No. 107 supra*, 407 U.S. at 176. If the commitment is done pursuant to procedures statutorily prescribed, the "nexus" requirement may well be satisfied.

On the other hand, the cases cited at note 20, *supra*, suggest that when the State enacts laws that codify existing private remedies, private action taken pursuant to such laws is not state action. It might therefore be necessary to determine whether the intent of the legislature in enacting Section 88–503.1(a) was to codify existing laws concerning the commitment of children or to establish new rights and responsibilities.

Assuming, *arguendo,* that *Adams* and *Lucas* are correct, we believe the actions of the state authorities in this case satisfy the standard they define. A parent's decision to commit his child to a state facility is effective only if the State physician determines that the child may be admitted. This determination necessarily marks the commitment process as state action.

II. THE STATUTORY PROCEDURES FOR PERMITTING COMMITMENT OF CHILDREN ON APPLICATION OF A PARENT OR GUARDIAN VIOLATE THE DUE PROCESS RIGHTS OF THE CHILD

A. THE PROTECTIONS OF DUE PROCESS APPLY TO THE CIVIL COMMITMENT OF CHILDREN TO STATE MENTAL INSTITUTIONS

This Court has held that the civil commitment of an individual, entailing a deprivation of the individual's liberty, is subject to the Due Process Clause of the Fourteenth Amendment. *Specht* v. *Patterson,* 386 U.S. 605, 608. Although in *Specht* the commitment was based on the criminal nature of the defendant's acts, commitment for treatment purposes is also subject to constitutional strictures. As Chief Justice Burger pointed out in his concurring opinion in *O'Connor* v. *Donaldson,* 422 U.S. 563, 580, involving an individual who had been civilly committed for treatment:[24]

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967). Cf. *In re Gault,* 387 U.S. 1, 12–13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.

[24] As the Court noted (*id.* at 565–566 and n. 2), the record in that case was not entirely clear concerning whether Donaldson was committed for treatment or because he might harm himself or others. There was, however, evidently no suggestion that he had committed any criminal act.

The fact that the individuals to be committed are children does not, by itself, make constitutional protections any less applicable. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights," *Planned Parenthood of Missouri* v. *Danforth,* 428 U.S. 52, 74. See also *In re Gault,* 387 U.S. 1; *Ingraham* v. *Wright,* 430 U.S. 651, 664–666, 672–676.

Appellants argue that a child has no independent right to challenge the decision of his parents that he should be committed to a mental institution, since, they suggest, that decision is not significantly different from the decision that the child should undergo treatment for a physical ailment (Brief 14–21).[25] But we believe the differences in the two situations

[25] Although we know of no case law suggesting that parents may not obtain treatment for physical ailments of their minor children against the wishes of the children, this Court has held that a State may not enforce a parental *veto* of a minor child's decision to have an abortion. See *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52.

may indeed be significant. The greater long-term loss of freedom, the danger facing a healthy person who is erroneously confined to a mental institution, and the greater stigma attached to hospitalization for mental disorders require greater attendance to procedural safeguards. See *Morrissey* v. *Brewer,* 408 U.S. 471, 481. These considerations, plus the peculiar difficulties of diagnosis and prognosis in the field of mental disorders (including the difficulty in some circumstances of determining which member or members of a family, if any, are in need of treatment), strongly indicate the need for independent review of parents' decisions to confine their children to mental institutions. Cf. *Greenwood* v. *United States,* 350 U.S. 366, 375.

B. A PARENT MAY NOT WAIVE THE PROCEDURAL PROTECTION TO WHICH HIS CHILD IS ENTITLED

This Court has recognized that a child's parent or guardian has the primary responsibility for directing the child's growth and development. In so directing his child, the parent is to be free of unreasonable governmental interference. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535. Cf. *Wisconsin* v. *Yoder,* 406 U.S. 205. Moreover, as a purely practical matter, when there is no substantial likelihood of a conflict of interest between

the parent and child, it is reasonable to assume that the parent possesses and the child lacks the maturity and experience that responsible decision-making requires, and that the child's dependency on the parent makes it appropriate to rely on the parent's decisions. Cf. *Smith* v. *Organization of Foster Families,* No. 76–180, decided June 13, 1977, slip op. 24–25, n. 44.

The situation is different when there is a significant likelihood of conflict. In *Prince* v. *Massachusetts,* 321 U.S. 158, this Court upheld the right of the State to regulate child labor in the face of a parental decision asserting a right to direct a child's religious training.[28] The State's finding that the rigors of child labor may have a harmful effect on children was held to justify the exercise of the State's authority (321 U.S. at 168–169), notwithstanding the parental desires to the contrary. Moreover, when parental authority has been upheld against interference by governmental authorities, this Court has emphasized that the parents' actions did not appear to conflict with the interests of the child. *Wisconsin* v. *Yoder, supra,* 406 U.S. at 229–

[28] Although in *Prince* the parental decision was made by the child's custodian, her aunt, the Court drew no distinction on that basis, and the same principles would seem to apply, whether the decision is made by a parent or an individual custodian or guardian. The considerations may, however, be quite different when the decision is made by a state agency acting as legal guardian. As appellees note (Brief 36), the interest of family privacy and autonomy is absent in those cases, as is the possibility, discussed *infra,* that the decision to request institutionalization for the child may itself be a pathological parental reaction.

234; *Meyer* v. *Nebraska,* 262 U.S. 390, 400. Finally, where the conflict is explicit, the Court has held that the State may not condition the exercise of the minor's rights on parental consent. In *Planned Parenthood of Missouri* v. *Danforth,* 428 U.S. 52, 74–75, the Court concluded that a state statute prohibiting any minor from obtaining a nontherapeutic abortion with parental consent unconstitutionally restricted the minor's right to privacy in favor of parental authority. At least in that situation "where the minor and the nonconsenting parent are so fundamentally in conflict * * * [a]ny independent interest the parent may have in [the decision] * * * is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant" (*id.* at 75). Although some of the minors involved in this case may be younger and less competent than those in *Danforth,* they are no less entitled to judicial recognition of their independent constitutional rights when those rights conflict with the interests of their parents.[27]

The record here supports the district court's conclusion that a parent's decision to seek commitment for his child may conflict with the child's best interests (J.S. App. 39a–40a; App. 35–36, 163, 266, 371, 473).[28]

[27] It may be that a very young child has an insubstantial right of privacy vis-a-vis his parents, but it does not follow that his right not to be confined in a mental institutional without due process of law is similarly limited.

[28] The district court in *Kremens* credited similar testimony, stating that, "[i]n deciding to institutionalize their children, parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interests of their children." *Bartley* v. *Kremens,* 402 F. Supp. 1039, 1047–1048 (E.D. Pa.) (three-judge court), dismissed as moot *sub nom. Kremens* v. *Bartley,* 431 U.S. 119.

The conflict may arise either because the parent more or less rationally decides to sacrifice the child's interests to his own needs,[29] or because the parent is himself in need of psychiatric treatment. The court summarized the record testimony as showing that (J.S. App. 39a; footnote omitted):

> "[I]t's by now a truism in child psychiatry, a truism built over maybe fifty years of clinical experience in a wide variety of settings, that the pathology of children is inextricably related to the pathology of the family. . . ." More often than not the parents as well as the child might need psychiatric help.

In these circumstances, the district court properly concluded that due process "necessarily includes procedural safeguards to see that even parents do not use the power to indefinitely hospitalize children in an arbitrary manner" (J.S. App. 51a), whether that power is rationalized as a waiver of their children's rights,[30] or as the performance of their duty to maintain, protect and educate their children (J.S. App. 49a).

[29] For example, one of the reasons J. L.'s mother wished to commit her son was his disruptive effect on her second marriage (App. 60, 96).

[30] This was the asserted rationale in *Kremens, supra* (see Government Amicus brief 13).

C. THE GEORGIA PROCEDURES FOR VOLUNTARY COMMITMENT OF CHILDREN DO NOT PROVIDE DUE PROCESS

After it is determined that due process attaches, the specific process to be provided must be determined. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481.[31]

In *Mathews* v. *Eldridge*, 424 U.S. 319, 334–335, this Court summarized the factors to be considered in determining whether existing procedures supply the degree of due process required in a given situation:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[31] While not determinative here, the due process standards promulgated in adult commitment and juvenile delinquency cases are instructive in deciding what process is due juveniles confined to mental health facilities, for the deprivation of liberty and the potential consequences are similar.

In the context of commitment of adults to mental health facilities, courts have held that due process requires an opportunity for a hearing on the need for confinement. See *In re Ballay*, 482 F. 2d 648 (C.A. D.C.); *In re Barnard*, 455 F. 2d 1370 (C.A. D.C.); *United States ex rel. McGurrin* v. *Shovlin*, 455 F. 2d 1278 (C.A. 3). In juvenile delinquency commitment proceedings, the juvenile is entitled to notice and a hearing with counsel, the right to confront and cross-examine witnesses, and to remain silent. *In re Gault*, *supra*. He is not entitled to a jury. *McKeiver* v. *Pennsylvania*, 403 U.S. 528.

See also *Smith* v. *Organization of Foster Families*, No. 76–180, decided June 13, 1977, slip op. 32.

The private interests affected here are those of the child and of his parents: both are interested in assuring that a child who needs the treatment he can receive in a mental institution receives that help as promptly as possible, and without unnecessary potentially traumatic procedures. The child has, in addition, a discrete and substantial individual interest in not being unnecessarily institutionalized. Cf. *In re Gault, supra*.[32] The parent has a discrete interest in freedom from State interference with his decisions regarding the custody and control of his child (cf. *Wisconsin* v. *Yoder, supra*). These interests do not necessarily conflict with the State's interest in assuring that those children, and only those, who require or will benefit from institutionalization are confined, and that the procedures by which this is accomplished are as efficient as possible. None of these

[32] In addition to the immediate denial of liberty resulting from commitment, hospitalization may result in a stigma that follows the child even after release, *In re Ballay*, 482 F. 2d 648, 667–669 (C.A. D.C.), as well as danger to the child's development, *Shuster* v. *Herold*, 410 F. 2d 1071, 1078 (C.A. 2); *Matthews* v. *Hardy*, 420 F. 2d 607, 611 (C.A. D.C.); App. 143, 177, 183, 297.

interests is insignificant. Accordingly, due process requires that each be accommodated in the procedures adopted.

The second factor here is the risk that the current procedures permit the confinement of juveniles who do not require and will not benefit from institutionalization, and the probable value, if any, of specific additional procedural safeguards in minimizing that risk. Finally, the additional burden of the proposed supplementary procedures on the State's mental health and judicial systems must be considered.

The challenged statute provides for the commitment of a child on the request of his parent or guardian if the child is "found to show evidence of mental illness and to be suitable for treatment" (Ga. Code Ann. 88–503.1(a)). In practice, the determination of suitability for treatment is made by the responsible physician at the State institution to which application for commitment is made. Although the doctor acts on the basis of interviews with the parent or guardian and the child, and whatever secondary material is available,[33] and thus after what is in some respects an

[33] Several witnesses testified concerning the method of gathering the information on which the commitment is ordered. All the medical witnesses, including superintendents of regional health centers, indicated that the primary source of information on which a decision to commit the child is based on the parents (App. 299, 370, 569, 801). The information secured from secondary sources, such as schools, is unverified (App. 263, 369, 472), and in some instances decisions on admission are reached even though information from secondary sources may not yet have been secured (App. 284).

informal hearing, his determination that commitment is appropriate is practically unreviewable.[34] Moreover, once the child has been institutionalized, there may be no regularly scheduled consideration of whether he has improved sufficiently to be released (see *supra*, p. 9).

The court of appeals concluded that the challenged statute "supplies not the flexible due process that the situation of the plaintiff children demands but instead, absolutely no due process" (J.S. App. 53a). It evidently based this conclusion on its finding that "children are institutionalized without a hearing or other procedural safeguards; are hospitalized without initial or periodic consideration of placement in the least drastic environment necessary for treatment; and are not afforded a hearing at any time for the determination of an appropriate required time for discharge" (J.S. App. 47a). Rather than attempt to define the minimum procedures required by due process in this situation, the court required appellants to conform to existing state procedures for involuntary or juvenile court commitments (J.S. App. 55a).[35]

We believe that there is a constitutional defect in the current procedures, since they provide no method by which any person adversely affected by the commitment order may challenge it before an independent tribunal, either before or after commitment. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 271; *Morrissey* v. *Brewer*,

[34] Cf. note 12, *supra*.

[35] These procedures are summarized at J.S. App. 33a–38a.

408 U.S. 471, 482. This "unbridled discretion" (J.S. App. 47a) vested in the admitting physician unnecessarily restricts appellees' liberty interests. Affording the opportunity for such review would not, in our view, significantly impinge on the interests of the parents or the State [36]—indeed, to the extent that it increases the chance that no one will be unnecessarily confined, it serves those interests. Nor would providing for such a right to review appear to impose an undue burden on the State's mental health or judicial systems. The number of hearings potentially involved is not large.[37] The court below required that all children be admitted pursuant to alternative procedures already available, noting in denying a stay that the proceedings required should not create a problem for the Georgia juvenile court system that disposed of 48,116 cases in 1974 (App. 941).[38] But if the currently available procedures do prove burdensome,[39] the State is free to adopt less elaborate ones, so long as they permit an effective appeal to an independent tribunal from the physician's decision to admit a child

[36] To the extent that a formal hearing might harm certain children, the existing statutory procedures permit the hearing to be "held in as informal a manner as possible and in a setting which is not likely to have a harmful effect on the mental health of the patient" (Ga. Code Ann. 88–307.3(f)).

[37] In fiscal year 1974, 515 children were admitted to Georgia state mental institutions pursuant to the challenged procedures (J.S. App. 12a); 154 such children were in custody on January 31, 1976 (App. 941).

[38] Indeed, the court suggested (J.S. App. 40a–41a) that state law may itself require that children in the custody of DFCS be admitted only pursuant to juvenile court procedures.

[39] See App. 918–933.

to a mental institution at the request of his parent or guardian.[40]

III. THE RECORD IS INADEQUATE FOR THIS COURT TO DETERMINE THE PROPRIETY OF THE DISTRICT COURT ORDER REQUIRING THE STATE TO PROVIDE ALTERNATIVE FACILITIES

Appellants' third question presented is whether they may be required to provide "needed mental health services in the most optimally appropriate treatment setting commensurate with the minor's condition" (J.S. 6). We do not believe that this question is ripe for review in this case. It is not clear from the opinion below whether the court concluded that the failure of appellants to assure that appellees were placed in "the least drastic environment necessary for treatment" was an independent violation of their due process rights (J.S. App. 47a, 52a) or whether its direction to provide "whatever non-hospital facilities are deemed by [appellants] to be most appropriate" for the 46 identified children [41] was simply an exercise of its equitable power to require appellants to remedy the effects on the appellees of the initial denial of procedural due process, or of unjustified continued confinement of the identified children (J.S. App. 53a–54a).

Moreover, the record is inadequate for this Court to determine whether the court's order is appropriate

[40] In order to be effective, the procedures might have to provide for the appointment of a person to represent the child's interests, at least when the child is very young or very ill.

[41] See *supra*, p. 12.

under either interpretation."[42] Appellants answered the court's request " 'to designate the situation in which they would like to see the child placed in order to get optimal benefits' " by identifying 46 children who could be released from the hospital if other facilities were available (J.S. App. 21a). But neither this exchange nor the rest of the record reveals whether continued confinement of appellees in State mental hospitals bears "some reasonable relation to the purpose for which the individual was committed," as required by *Jackson* v. *Indiana,* 406 U.S. 715, 738. The absence of such a reasonable relationship could itself require the State to place those children in situations that afford them the freedom appropriate for a child whose mental condition does not require hospitalization. *Jackson* v. *Indiana, supra;* cf. *O'Connor* v. *Donaldson,* 422 U.S. 563, 575. If there was no such reasonable relation, it would be unnecessary to reach the questions whether the identified alternative placements were less restrictive than confinement in the mental institution, and, if so, whether there is a substantive due process right to treatment or to the least restrictive appropriate confinement.

[42] The record, for example, does not describe the differences between the conditions of confinement and the degree of freedom permitted a child in a hospital, as compared to a child placed in specialized foster care, a group home, therapeutic camp life, or other non-hospital placement (see J.S. App. 18a–19a, 54a). In addition, it is not clear whether, for those children for whom state hospital officials recommended placement in non-hospital facilities, it is, as for J. R., merely the lack of available facilities that caused their continued confinement, or whether other factors were present.

If those questions are nonetheless to be reached, the record should be supplemented with regard to the former (see, *e.g.,* Brief of Appellants 48–49[43]) and this Court should have the benefit of an explanation of the legal basis for the district court's views on the novel and difficult issues involved in the latter.

Alternatively, if the court's order is simply an exercise of its equitable remedial powers, the propriety of the order would depend on an evaluation of the factors identified in *Milliken* v. *Bradley,* No. 76–447, decided June 27, 1977 (slip. op. 12–13; emphasis supplied):

> In the first place, like other equitable remedies, the nature of the * * * remedy is to be determined by the nature and scope of the constitutional violation. * * * The remedy must therefore be related to "the condition alleged to offend the Constitution. . . ." Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." * * * Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. [Footnotes omitted.]

In light of the ambiguity of the opinion and the paucity of the record, we submit that it is appropriate that the district court make those evaluations in the

[43] Moreover, the record does not show what is meant by the "residential treatment" recommended for 11 of the children (J.S. App. 21a–22a, n. 18), and it is thus not clear whether that is a less restrictive form of treatment.

first instance, if indeed it intended that its order be simply remedial.

Finally, it is not clear whether the district court found that due process requires the periodic hearings to assure that the child still requires hospitalization that are required under the alternative statutory procedures that appellants were directed to utilize (see J.S. App. 34a, 38a). Nor is it clear that the questions presented in the jurisdictional statement reasonably comprehend any such finding the court may have made. If the Court concludes that that issue is before it, we believe it would also be proper to require the district court to clarify that question on remand, particularly since its conclusions on that matter may be affected by the scope of the determination concerning alternative treatment facilities.

CONCLUSION

For the foregoing reasons, the order of the court below should be remanded for further consideration of the need to provide alternative treatment facilities and to conduct periodic reviews of the need for continuing hospitalization, and affirmed in all other respects.

Respectfully submitted.

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